

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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U.S. BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:) Chapter 11
)
W. R. GRACE & CO., et al.,) Case No. 01-01139 (JJF)
)
Debtors.) Jointly Administered
)
) Objections Due By 7/11/01 @ 4:00 p.m.
) Hearing Date: 7/19/01 @ Noon

**NATIONAL MEDICAL CARE'S RESPONSE TO THE JOINT MOTION BY THE
OFFICIAL COMMITTEES OF ASBESTOS PROPERTY DAMAGE
AND ASBESTOS PERSONAL INJURY CLAIMANTS FOR AUTHORITY
TO PROSECUTE FRAUDULENT TRANSFER CLAIMS (DOCKET NO. 477)**

National Medical Care, Inc. ("NMC"), submits this response to the motion filed jointly by the Official Committee of Asbestos Property Damage Claimants and the Official Committee of Asbestos Personal Injury Claimants (collectively, the "Asbestos Committees") seeking authority to prosecute certain fraudulent transfer claims on behalf of the Debtors.

INTRODUCTION

In their joint motion, the Asbestos Committees seek authorization to challenge as fraudulent conveyances certain transfers made in connection with two complex corporate transactions: a 1996 transaction involving the combination of NMC with the worldwide dialysis business of Fresenius AG (the "Fresenius transaction"), and a 1998 transaction involving the combination of the Debtors' packaging business with Sealed Air Corporation (the "Sealed Air transaction"). Although Fresenius takes no position on whether this Court should empower the Asbestos Committees to evaluate or pursue the alleged fraudulent transfer claims, we do believe that the joint motion mischaracterizes the factual background of the Fresenius transaction, obscures the legal and factual impediments to the

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successful assertion of a fraudulent conveyance claim based on the Fresenius transaction, and avoids altogether discussing the enormous burden that this litigation will impose on the Debtors and their Estates. Accordingly, NMC urges the Court to acknowledge the role the Debtors will need to play in the resolution of the novel theories that the Asbestos Committees seek to present, and to insist that such litigation go forward, if at all, in this Court, so that the Court can closely monitor the litigation and ensure that all the interests of the Estates are properly protected.

ARGUMENT

I. THE ASBESTOS COMMITTEES HAVE MISCHARACTERIZED THE 1996 TRANSACTION BETWEEN GRACE AND FRESENIUS

A. Overview

While NMC intends to defend itself vigorously in any adversary proceeding in this Court alleging fraudulent transfer claims, it would, of course, be premature for NMC to present its defense on the merits before a complaint has even been filed. Nonetheless, the mischaracterizations contained in the joint motion of the Asbestos Committees require a short response that accurately sets forth the circumstances of the Fresenius transaction.

In particular, this Court should view with great skepticism the suggestion of the Asbestos Committees that the 1996 Fresenius transaction was designed to shield NMC from asbestos liability. (Joint Motion at 1 and 5.) To the contrary, at the time of the 1996 transaction NMC and certain of its affiliated subsidiaries were the targets of criminal and civil investigations being conducted by various agencies of the federal government, which investigations related to allegations regarding certain billing and reimbursement practices. Among the potential penalties NMC and its subsidiaries faced as a result of the

investigation were substantial fines, civil penalties, forfeitures, and exclusion from participation in all federal health care programs.

In the four years that followed the Fresenius transaction, Grace remained a profitable, solvent, and well-capitalized company. During that same time, NMC bore the burdens, disruptions, and expense of the various federal and state criminal and civil investigations. To date, these investigations have cost NMC and its affiliates well in excess of \$500 million in penalties and expenses, and related private civil litigation still continues. No doubt that is why during the four years following the Fresenius transaction not a single creditor sought to attack the transaction as "fraudulent" or to impose liability on NMC or its affiliates for the conduct of Grace. To put it quite bluntly, for those four years it appeared to most that Grace may well have gotten the better of the deal between these large and sophisticated companies.

It is only after significant changes in circumstance -- now that Fresenius has resolved substantial portions of its reimbursement litigation and Grace has faced an unforeseeable explosion in meritless asbestos claims -- that the Asbestos Committees seek to revise history and claim that the 1996 transaction was fraudulent "in purpose and effect." (Joint Motion at 1.) To mount this attack, the Asbestos Committees seek not only to ignore the realities that were known and reasonably foreseeable as of 1996, but they try to avoid any mention of the significant financial strength demonstrated by Grace in the years immediately following the Fresenius transaction.

B. Grace Obtained the Highest and Best Value for NMC

As of the end of 1995, W.R. Grace & Co.-Conn. (Grace-Conn.) owned all the outstanding common stock of NMC, which was a large provider of dialysis services and

products throughout the United States. Grace-Conn., in turn, was wholly owned by W.R. Grace & Co., a New York corporation (Grace-N.Y.).

Beginning in the fall of 1995, Grace-N.Y. and its affiliated companies (collectively, "Grace") engaged in arms-length negotiations with several entities relating to the possible sale or merger of NMC. Ultimately, Grace decided that the best value could be obtained by negotiating a reorganization that would result in the tax free combination of NMC with the worldwide dialysis businesses of Fresenius AG. (Fresenius AG is a German corporation with its principal place of business in Bad Homburg, Germany.)

The 1996 transaction was structured in such a way as to provide maximum tax benefits to Grace. As a result of this structure, consideration was paid both directly to Grace-Conn. and to Grace shareholders. Ultimately, however, the Fresenius entities paid over \$4 billion in cash and stock for NMC. Of that, Grace-Conn. received a tax free cash distribution of approximately \$2.1 billion. Moreover, and perhaps equally important, Grace-Conn. received from the Fresenius entities an indemnity agreement, which assured that Grace would not bear any of the potential liability arising out of the ongoing investigations of NMC.

In addition to receiving over \$2 billion in tax free cash at the time of the transaction, Grace-Conn. remained a solvent, well capitalized entity long after the Fresenius transaction. For over four years after the transaction, Grace continued to pay its debts as they came due, obtained hundreds of millions of dollars in unsecured lines of credit from some of the world's most sophisticated financial institutions, paid millions of dollars in dividends, paid hundreds of millions of dollars in asbestos settlements, and maintained a significant market capitalization (over \$1.4 billion eighteen months after the

transaction, and approximately \$1.2 billion a full three years after the transaction). To say that the Asbestos Committees will be pursuing novel theories to argue that such a company was rendered insolvent or undercapitalized as of 1996 is an understatement.

Although the structure of the Fresenius transaction may have been complicated, this transaction did not constitute a fraudulent transfer under applicable law. That said, this Court should be mindful of the degree to which any fraudulent conveyance claim relating to the Fresenius transaction necessarily will require significant involvement and attention by the Debtors.

II. LITIGATION OF THE FRAUDULENT TRANSFER CLAIMS WILL REQUIRE SIGNIFICANT INVOLVEMENT OF GRACE

The joint motion of the Asbestos Committees makes clear that whatever entities the committees might ultimately elect to sue, it is the conduct of Grace that they really wish to challenge. The joint motion suggests that the Asbestos Committees will claim that Grace had a fraudulent purpose in entering into these transactions, and that the effect of one or both of the transactions was to render Grace insolvent or undercapitalized. Accordingly, the fraudulent conveyance litigation necessarily will focus on the intentions and conduct of Grace management, the financial condition of Grace, and the reasonably foreseeable asbestos liabilities of Grace at the time of the transactions. All of this information is unavailable to either NMC or Sealed Air, and thus it is to Grace personnel and documents that all of the parties will turn for the primary factual information in this case.

Thus, the issue of who should prosecute the fraudulent transfer claims is not the only matter that must be resolved before litigation can be commenced. There remains the outstanding issue of where the fraudulent transfer claims should be litigated. NMC joined in Grace's motions in both the Abner and Woodward cases seeking to transfer the

litigation to Delaware. On June 13, 2001, Grace's motion to transfer in Woodward was granted. However, no action has been taken to date on the pending transfer motion in Abner.

Litigation of the fraudulent transfer claims in a forum other than the forum in which the underlying reorganization is going forward will unnecessarily complicate and delay Grace's reorganization. Because the fraudulent transfer claims are based on Grace's alleged intent and financial condition at the time of the transactions, much of the burden of defending the fraudulent transfer claims will require the involvement of Grace and will impose a significant burden on the company. As Grace has stated in its Amended Complaint for Declaratory and Injunctive Relief, many of the witnesses who would provide key testimony in any fraudulent transfer litigation are the same individuals who will be integral to Grace's successful reorganization. (Am. Compl. ¶ 57.) Litigating the fraudulent transfer claims in the same Court as the bankruptcy proceeding will ensure that the litigation of those claims will be resolved expeditiously and without unnecessarily delaying Grace's reorganization.¹

Moreover, this Court has a direct interest in preventing any unnecessary waste or expense in the conduct of any fraudulent conveyance litigation. Because NMC and Sealed Air both have indemnification rights against Grace, which the Debtors have acknowledged in Court and in their filings, the unnecessary continuation or expansion of any fraudulent conveyance litigation could result in additional administrative expenses for the Estates.

¹ Moreover, once the Court makes the initial determination as to who should prosecute the fraudulent transfer claims, some modification to the automatic stay and/or the preliminary injunction order may be required in order to allow the parties effectively and fairly to litigate the relevant issues.

CONCLUSION

For all the foregoing reasons, Fresenius requests that if the Court grants the Asbestos Committees (or any other individual or entities) the authority to evaluate or pursue fraudulent transfer litigation against Fresenius, that the Court require such litigation to be brought in this Court, where such litigation can be resolved fairly, efficiently, and with due regard to the interests of all constituencies to this bankruptcy proceeding.

Wilmington, Delaware
Dated: July 11, 2001

Respectfully submitted,

MORRIS, NICHOLS, ARSHT & TUNNELL

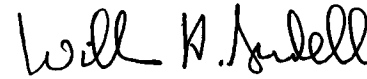
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July, 2001, a copy of National Medical Care's Response To The Joint Motion By The Official Committees of Asbestos Property Damage And Asbestos Personal injury Claimants For Authority To Prosecute Fraudulent Transfer Claims (Docket No. 477) was served on the parties listed on the attached service list.



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